

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 1569 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

VIHABHAI SARTANBHAI DESAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 1569 of 2003
MR KJ SHETHNA for Petitioner No. 1
MR AD OZA, PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 16/04/2003

ORAL JUDGEMENT

1. Heard ld. Senior Counsel Mr. KJ Shethna for the

petitioner accused- original accused no.2 and ld. PP Mr. A.D.Oza for the State.

2. Rule. Service of Rule is waived by ld. PP Mr. Oza for the State. With the consent of the parties, application is heard today.

3. This application is preferred by the petitioner original accused no.2 under Section 439 of CrPC for releasing him on bail in connection with I.CR No.151/2000 registered with Amaraiwadi Police Station for the offences punishable under Section 302 R/w Sec.34, 120-B of the IPC and under Section 135(1) of the Bombay Police Act. This successive bail application is by the accused, who along with other accused persons is facing trial of a case being Sessions Case No. 72/2001 pending with the Court of Sessions, Ahmedabad City. On merits, none of the applications for bail preferred by the present petitioner is granted either by the Court of Sessions or by this Court. However, he was enlarged on temporary bail on two occasions by this Court viz (i) vide order dated 2.8.2000 while dealing with Misc. Criminal Application No.4067/2000 by this Court on account of the death of his father as he was to perform funeral rites and other rituals, and (ii) in the month of September and November 2001, he was enlarged on temporary bail because of sickness of his close relative i.e. his wife. The petitioner has time and again preferred bail applications and one such application for bail being Cri. Misc. Application No. 2614/2000 came to be rejected by the Court of Sessions, Ahmedabad city vide order dated 5.2.2001 by speaking and reasoned order. The said order is on record. I have carefully perused the reasons assigned by the Sessions Court while rejecting the said application, along with the fact of failure of other applications.

4. Ld.Senior Counsel Mr. Shethna has taken me through the number of grounds raised by the present petitioner in the memo of the petition, but it is not necessary to discuss all of them as while dealing the application for bail preferred by the present petitioner, being Misc. Criminal Application No. 8782/2002, practically all the grounds raised in present application were agitated and were not accepted while rejecting the said bail plea, vide order dated 19.12.2002. As this Court was neither inclined to exercise discretion in favour of the petitioner nor to enlarge him on bail temporarily, the ld. counsel appearing for the petitioner, on instructions, withdrew the said bail application. His request to grant even temporary bail

was rejected. It would be proper to quote relevant part of the order passed by this Court on 19.12.2002 in the said application viz. Cri. Misc. Application No.8782/2002 :-

"1. xxxx xxxx xxxx

2. xxxx xxxx xxxx

3. Mr. Shethna, ld. counsel appearing for the petitioner, on instructions withdraws this petition requesting to grant temporary bail. So the petition stands dismissed as withdrawn. Rule discharged. "

5. The say of ld. Senior Counsel Mr. Shethna is that this Court considering the period undergone by the present petitioner as an undertrial, should exercise discretion in favour of the petitioner as the petitioner accused is facing protracted long trial for no fault on his part. Unusual delay is being caused because of the transfer of the Sessions Case to another Presiding Officer by the Principal City Sessions Judge, to a Court situated on the ground floor, on account of the sickness of the ld. counsel appearing for some of the accused persons. The complainant preferred Criminal Revision Application challenging the said order of transfer and the stay of trial is granted in the said proceedings by this Court. The State of Gujarat has also now joined the said grievance by filing Cri. Revision Application and both the revision applications are pending hearing. It is submitted that the parties are not proceeding with the said revision applications and petitioner is undergoing incarceration without trial. The stay granted has become hurdle in speedy disposal of trial and the petitioner apprehends that the time which might be spent in disposal of said revision applications will result into more delay in actual conclusion of the trial. In view of settled legal position and right flowing from Article-21 of the Constitution of India, this Court can consider and should consider this aspect as a "change in circumstance" in favour of the petitioner accused and he should be enlarged on bail even on stringent conditions. The petitioner is not the main accsued. Earlier when the present petitioner was enlarged on temporary bail because of death of his father and on second occasion because of sickness of his wife, and it is not the say of the prosecution, even today, that the accused had violated any of the conditions of temporary bail granted to him on earlier occasions or had failed in surrendering to judicial custody. Accused is a young man and law abiding citizen. Ill-health of his 2nd wife Zalaben has taken sensitive turn and she is suffering from depression because of protraction of trial.

6. I have considered the nature of illness of the second wife of the present petitioner brought to the notice of this Court during the oral submissions advanced by ld. Senior Counsel Mr. Shethna. On the ground of ill-health of the second wife of the petitioner accused, this Court has not granted bail to the present petitioner on earlier occasion. Merely because the second wife of the petitioner accused is staying separately and residing with her minor daughter, would not help the petitioner accused because on earlier occasions, when bail plea was advanced and considered, these facts were very well in existence. This aspect does not provide any fresh or new ground under which this Court can exercise discretion in favour of the present petitioner.

7. The gravity of the offence is relevant and other apprehensions expressed by the Investigating Officer more particularly when accused is praying for bail mainly on the ground of protraction of trial, are also required to be considered. It is true that the petitioner is under trial and is in judicial custody since more than 2 years, but that by itself would not be sufficient to grant bail.

8(i) The prosecution case is based on number of important witnesses and circumstantial evidence. Certain stringent conditions even if imposed, would not take care of certain circumstances and apprehensions expressed by the other side. I am told that on the strength of the complaint made by the original accused no.1, some proceedings are under contemplation against one of the important prosecution witness so as to put pressure on him. This is by way of one example, but there are number of ways and means under which an important witness can either be induced or brought under threat. In many cases, witnesses can be eliminated, but it would not be proper for this Court to go into any hypothetical conclusion.

8(ii) This Court is aware that it is the accepted principle of law that decision of the Court should be based on the facts and circumstances available on record and the law governing the field and it should not be on any extraneous consideration. However, the Court also cannot shut its eyes to any relevant proceedings pending in the very Court and especially with very Bench. When this application for bail was listed for hearing and was under consideration, it came to the notice of the Court that the facts mentioned in Spl.C.A. No. 4544/2003 are

very relevant. Without presuming or assuming anything against the present applicant, it can be inferred that an attempt to tarnish the evidentiary value of one or more prosecution witnesses might have been made otherwise detention proceedings against the person concerned would not have started on the complaint made by the complainant. So, the apprehension expressed by the other side viz. State of Gujarat that the applicant if enlarged on bail, is likely to tamper with evidence or prosecution witness, cannot be ruled out. I am of the view that this cannot be totally ignored.

8(iii) When the accused is facing serious charge, he may develop temptation to jump the bail and this Court has observed that only on this count, in the cases where accused is facing serious charge having strong prima facie case, should not be enlarged on bail and court should not exercise discretion in favour of such accused. The impact of the grant of bail on the society is also one of the relevant aspect which cannot be ignored. According to the prosecution, the deceased has been done to death in a planned manner and he was taken from Mangal Deep Party Plot where he was present sitting with others in a Maruti Van. It is not a matter of dispute that the present petitioner was one of the accused participant in the entire occurrence and the offence. Motive is also seriously attributed to him. Therefore, I do not deem it just and proper to enlarge him on bail. On the contrary, the petitioner being the party to the pending Cri. Revision Applications should try to see that said applications are heard as expeditiously as possible. The stay granted by this Court against the actual proceedings of the trial, would not by itself give rise to any right to the accused of being released on bail. Case is transferred to a Court holding sitting on the ground floor, at the request of the ld. Advocate appearing for the petitioner, as I am told. On various grounds, the bail plea raised by the petitioner have been turned down by this Court as well as by the Sessions Court. When there are dismissal of bail applications on merits by this Court, the exercise of discretion again in favour of the accused in the midst of pending trial is not warranted. There must be a case of extreme exceptional circumstance in favour of the accused and this is not the case of such category.

9. Number of factors which require consideration at the time of grant of bail have been enumerated in number of the decisions, but I have kept in mind the ratio of the decision of the Apex Court in the case of Ram Pratap Yadav v/s Mitra Sen Yadav, reported in 2003(1) GLR 514 and also observations made by this Court in the case of

State of Gujarat v/s Lalji Popat & Others, reported in 1988(2) GLR P. 1073 and the ratio of this decision goes against the present applicant. In the case of State of UP v/s Atique Ahmed, reported in 2002 AIR SCW 2673, the Apex Court has not exercised discretion in favour of the accused when a temporary bail was sought on account of ill-health of the family member of the accused. In view of the ratio laid down in the judgment, the bail plea of the present petitioner also requires to be rejected.

9(i) In the case of Smt. Akhtari Bi v/s State of M.P., reported in 2001 AIR SCW P.1236, the Apex Court has held that unreasonable delay in hearing and disposal of criminal appeal or trial confers right on the accused to apply for bail. So, the bail plea in such cases where unreasonable delay is caused in conducting and concluding the trial, cannot be thrown out merely on the ground that the application is a successive application after rejection of the earlier application of bail on merits.

9(ii) It is true that in the decision in the case of P.Ramchandra Rao v/s State of Karnataka, reported in 2002 AIR SCW 1841, the directions with regard to the bail issued by the Apex Court in the case of Common Cause Case-I, reported in 1996 AIR SCW P.2279, while following the decision, the Apex Court abstained from dealing with the legality and propriety as that was not the subject matter of reference. But, it cannot be ignored that in the very judgment, the Apex Court has observed that in the case of Abdul Raheman Antulay v/s R.S.Nayak, reported in 1992(1) SCC 225, even the Supreme Court has chosen to decline the request for fixing of any period or time limit for trial of offence not on any total want or lack of jurisdiction of Supreme Court, but for the reasons that it is neither advisable nor practicable to fix any such time limit and that non-fixation does not ineffectuate the guarantee of the right of speedy trial. So, in a case where the accused is facing serious charges i.e. charge of criminal conspiracy to commit the murder and where murder is committed, the Court should be conservative in accepting the bail plea on the ground of alleged delay caused. In the case on hand, the accused is in judicial custody for about 2 years.

9(iii) It is rightly pointed out that the ratio of the decision in the case of Ram Pratap (supra), would come in the way of the present applicant. It is true that this is not a case where the applicant has been convicted earlier by any competent court or has been involved in any other crime, but the nature of case placed by the prosecution in reference to the quantum of punishment prescribed for the offence in respect of which bail is

sought, is found more relevant. Ratio of the decision in the case of Akhtari Bi (supra) simply carves out an exception in proposition of law that when bail plea has not been accepted on merits even after filing of the chargesheet, such accused even may not be granted temporary bail and successive application normally would not lie. Decision in the case of Akhatari Bi (supra), gives privilege to an accused who is undergoing incarceration for unreasonably long period pending trial. If the accused prima facie able to show that his right to have speedy trial has been grossly violated, then he may apply for bail. This decision confers only right to apply for bail. If bail plea on such ground is placed before the Court, than such plea requires to be evaluated in the light of the totality of the facts of the case and the period for which the applicant has remained in judicial custody. Right to speedy trial as mentioned earlier, has been discussed by the Apex Court in the case of Akhatari Bi (supra)....

10. Ld. Senior Counsel Mr. Shethna, of course, has drawn attention of this Court to the fact that affidavit filed by PSI Shri Chudasama, DCB Police Station, Baroda City, cannot be considered because recently he has been transferred to Baroda from Ahmedabad City and he is not the officer competent who can respond to the exact present situation qua maintenance of law and order or mental state of the petitioner or the health of his wife. I am inclined to accept the submission of ld. PP Mr. Oza that as PSI Shri Chudasama has investigated the crime, he was asked to file affidavit and facts stated by Shri Chudasama are based on his knowledge and information received and it is not necessary to file affidavit by the officer who is at present working with DCB Police Station. This technical plea also would not help the petitioner.

11. For the reasons aforesaid, there is no merits in this application and the same is dismissed. Rule discharged.

16.4.2003 [C.K. BUCH, J]

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